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Compensatory Racial Redistricting: United Jewish Organizations of Williamsburgh, Inc. v. Carey

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NOTES

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Pursuant to section 5 of the Voting Rights Act of 1965,[1] the State of New York submitted its 1972 reapportionment plan for Kings County to the United States Attorney General. He denied approval of certain state legislative districts because the state had failed to show that the redistricting conformed to the Act. After informal consultation with the Attorney General's Office, the state submitted a revised plan which retained the original number of nonwhite majority districts, but which increased the percentages of nonwhites in the disputed districts. In order to gain this increase, the revised plan split the Hasidic Jewish community,[2] which had previously been contained in a single district, into different districts having a minimum nonwhite population of sixty-five percent. Representatives of the Hasidic community brought an action against New York officials and the United States Attorney General, alleging that their rights under the Voting Rights Act and the fourteenth and fifteenth amendments[3] were violated by diluting their vote. The district court granted a motion to dismiss the complaint,[4] and the Second Circuit upheld the district court in a divided opinion.[5] The Supreme Court granted certiorari. *Held, affirmed*: the state's use of explicit racial criteria in order to obtain the Attorney General's approval of reapportionment under the Voting Rights Act did not violate fourteenth or fifteenth amendment rights of majority voters. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 97 S. Ct. 996, 51 L. Ed. 2d 229 (1977).

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1. 42 U.S.C. § 1973c (1970). This provision of the Act requires states or political subdivisions subject to § 4 of the Act, 42 U.S.C. § 1973b (1970), to obtain approval of changes in voting procedures, including redistricting, by either submitting them to the Attorney General or filing for a declaratory judgment in the United States District Court for the District of Columbia.

2. The community is tightly knit both geographically and socially. Its 30,000 members are concentrated in the Williamsburgh area of Brooklyn where unique social and religious practices reflect 19th century life in small towns in Poland.

3. The equal protection clause forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." *Id.* amend XV, § 1.

4. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 377 F. Supp. 1164 (E.D.N.Y. 1974).

5. United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512 (2d Cir. 1975). The circuit court held that plaintiffs had no standing as members of the Jewish community to assert rights under the Voting Rights Act; although the plaintiffs had standing as white voters to assert the violation of fourteenth and fifteenth amendment rights, the Court held that there was no violation of these rights. The issue of standing as members of the Hasidic community to complain as minorities under the Voting Rights Act was not appealed to the Supreme Court.

The circuit court decision is discussed and evaluated in Note, *Proportional Representation by Race: The Constitutionality of Benign Racial Redistricting*, 74 MICH. L. REV. 820 (1976) (decision improper because purpose and possible effect of conscious use of racial criteria is to dilute the voting power of nonminority members and thereby diminish their constitutional right of political access); 63 GEO. L.J. 1321 (1975) (decision approved because noncolorblind criteria permissible in remedial contexts); 9 SUFFOLK U.L. REV. 1496 (1975) (decision approved because required to achieve Attorney General's approval and permitted by political considerations approved in Gaffney v. Cummings, 412 U.S. 735 (1973)).

I. VOTING RIGHTS, REAPPORTIONMENT, AND BENIGN DISCRIMINATION

The Voting Rights Act of 1965[6] may be seen as the culmination of twentieth century judicial and legislative efforts to protect the franchise legally extended to blacks by the fifteenth amendment in 1870.[7] In a series of decisions in the late 1960's and early 1970's the Court upheld the constitutionality of the Act,[8] and held that apportionment and redistricting decisions fell within its scope. By that time the Court had overcome its traditional reluctance to become involved in redistricting litigation and had decided cases under both the fourteenth and fifteenth amendments.[9]

In *Gaffney v. Cummings*[10] the Supreme Court considered political rather than racial redistricting. Connecticut explicitly based its reapportionment on a political fairness principle that would guarantee representation of Republicans and Democrats in the legislature in roughly the same proportion as they existed in the population.[11] The Court approved the use of these specific goals. Conceding that district lines could not be drawn in the absence of political knowledge, the Court stated that "it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended."[12] Although *Gaffney* involved political redistricting, race was mentioned in Justice White's majority opinion; he suggested that different results might occur "if racial or political groups

6. 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1970).

7. The legal background of *United Jewish Organizations* implicitly reflects moral, political, and legal ideals of equality applied to treatment of racial minorities in the area of voting and redistricting. Treatment of racial minorities may be analyzed by considering two competing ideals of equality. *See generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971). The "equal achievement" ideal is primarily result or end oriented; the "equal treatment" ideal is primarily means or opportunity oriented.

For an early use of similar concepts in the area of voting qualifications see Fiss, *Gaston County v. United States: The Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379. The analysis is useful in understanding discussions of redistricting. The ideal of equal achievement supports proportional or "equal" representation; the ideal of equal treatment supports an "equal" vote irrespective of the representation that results. *See* generally, Note, *Reapportionment on the Sub-State Level of Government: Equal Representation or Equal Vote?*, 50 B.U.L. REV. 231 (1970); Note, *Proportional Representation by Race: The Constitutionality of Benign Racial Redistricting*, 74 MICH. L. REV. 820 (1976).

8. *See, e.g.*, Georgia v. United States, 411 U.S. 526 (1973) (state reapportionment decisions within scope of Act); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (shift from district-based to at-large voting within scope of Act); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (specific remedies authorized by Act, including requirements of Attorney General approval involved in *United Jewish Organizations*, approved).

9. Prior to Gomillion v. Lightfoot, 364 U.S. 339 (1960) (state plan redrawing city boundaries disenfranchised black voters contrary to the fifteenth amendment), and Baker v. Carr, 369 U.S. 186 (1962) (beginnings of one-man, one-vote doctrine), the Court had held redistricting controversies to be nonjusticiable under the political questions doctrine. Colegrove v. Green, 328 U.S. 549 (1946). The one-man, one-vote decisions were based on the equal protection clause of the fourteenth amendment. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). See the cases collected in Annot., *Diluting Effect of Minorities' Votes by Adoption of Particular Election Plan, or Gerrymandering of Election District, as Violation of Equal Protection Clause of Federal Constitution*, 27 A.L.R. FED. 29 (1976).

10. 412 U.S. 735 (1973).

11. *Id.* at 752. Viewed in terms of equal achievement or equal treatment, the Court approved an application of the ideal of equal achievement to political redistricting. *See* note 7 *supra* (distinction between equal treatment and equal achievement).

12. 412 U.S. at 753.

have been fenced out of the political process and their voting strength invidiously minimized."[13]

The Court, in *City of Richmond v. United States*,[14] considered a racial redistricting situation. The Supreme Court held that the annexation of a predominantly white area to the city did not deny or abridge, under section 5 of the Voting Rights Act, the right of blacks to vote in the enlarged post-annexation city. The Court, however, based its reasoning on the grounds that, at the time the plan was upheld, the city had shifted from an at-large plan for the election of the city council to a district system that preserved black voting strength.[15]

In *Beer v. United States*[16] the Court held that a reapportionment plan for New Orleans city council districts had neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. The Court indicated, however, that abridgement of the franchise, and, thus, violation of the Voting Rights Act, would be found if the proposed change would lead to a "retrogression in the position of racial minorities with respect to their *effective exercise* of the electoral franchise."[17] The New Orleans reapportionment did not constitute a retrogression because the number of black majority districts was increased.[18]

II. UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC. v. CAREY

Development of new remedial devices such as busing,[19] affirmative action in employment,[20] and preferential admissions[21] has led to concern over

13. *Id.* at 754.

14. 422 U.S. 358 (1975). *City of Richmond* was decided after the circuit court decision in *United Jewish Organizations*.

15. *Id.* at 370. The Court considered the ideal of equal achievement in the sense of proportional representation as an important factor whether or not it had been explicitly considered by the city. *See* note 7 *supra* (distinction between equal treatment and equal achievement).

16. 425 U.S. 130 (1976). The *Beer* decision is discussed in 60 MARQ. L. REV. 173 (1976) (concluding the nonretrogression test far too weak). Along with *City of Richmond*, Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), *Beer* has been widely deplored as signaling the Court's retreat from affirmative eradication of racial discrimination. *Cf.* 425 U.S. at 143-63 (dissenting opinions of White, Brennan, and Marshall, JJ.) (*Beer* test too weak).

17. 425 U.S. at 141 (emphasis added). The *Beer* nonretrogression test is achievement rather than treatment oriented; it emphasizes the results of redistricting rather than the process by which the lines are drawn.

18. The nonretrogression test is only a preliminary test; passing it alone is not sufficient to justify constitutional approval. If no retrogression is found it must still be determined that the redistricting meets fourteenth amendment requirements. 425 U.S. at 141. *See also* 60 MARQ. L. REV. 173, 180 (1976).

19. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

20. *See, e.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (affirmative action program based on executive order for government contractors on construction projects upheld). For a discussion of the cases on reverse discrimination in employment see Annot., 26 A.L.R. FED. 13 (1976).

21. *Compare* Justice Douglas's dissenting opinion in DeFunis v. Odegaard, 416 U.S. 312, 320 (1974), *and* the majority opinion in Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 45 U.S.L.W. 3570 (Feb. 2, 1977) (preferential admissions programs unconstitutional), *with* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976), *and* the dissenting opinion in *Bakke*, 18 Cal. 3d at 54, 553 P.2d at 1172, 132 Cal. Rptr. at 700 (preferential admissions constitutionally permissible).

reverse discrimination[22] in the area of voting rights and redistricting.[23] The existence of reverse discrimination against white voters was at issue in *United Jewish Organizations* through New York's use of explicit racial quotas. The quotas were derived from informal consultation with the Attorney General in order to satisfy the federal requirement of the Voting Rights Act.[24] The Court's holding that no constitutional discrimination existed in the revised redistricting plan "carries us further down the road of race-centered remedial devices than we have heretofore traveled—with the serious questions of fairness that attend such matters."[25]

Without being able to agree on a majority opinion, four of the members of the Court agreed[26] with the Second Circuit that (1) the use of racial criteria in drawing district lines may be required by section 5 of the Voting Rights Act, (2) the use of racial criteria is not limited to remedies of explicit prior discrimination, and (3) the use of numerical racial quotas in establishing certain black majority districts does not automatically violate the fourteenth and fifteenth amendments. Writing for the plurality, Justice White agreed with the lower court's interpretation of the Voting Rights Act and its interpretation of the decisions upholding the Act's constitutionality.[27] Given the proper application of the Act's triggering device and its constitutionality,[28] the use of explicit racial criteria is appropriate whether or not there is a finding of prior discrimination.[29]

Justice White went further than the Second Circuit in his discussion of the applicability of *Beer*[30] and *City of Richmond*.[31] The use of numerical racial quotas was found permissible in the absence of a showing that New York had done any more than was required to obtain approval under the *Beer* test:

22. There is no generally accepted definition of the contrast between "benign discrimination" and "reverse discrimination." When applied to preferential treatment for previously unjustly disadvantaged groups, "benign discrimination" suggests a treatment that is morally and legally permissible, and perhaps even desirable or obligatory. "Reverse discrimination," however, suggests undesirable treatment that may be morally impermissible or unconstitutional. Other descriptive content of the terms must be gained from the context in which each writer uses them. *See, e.g.*, 97 S. Ct. at 1012, 51 L. Ed. 2d at 249 (Brennan, J., concurring).

23. An explanation of the increased concern over this issue and an interesting analysis of some of the moral questions posed can be found in Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHILOSOPHY & PUBLIC AFFAIRS 348 (1973). *See also* Note, *Compensatory Racial Reapportionment*, 25 STAN. L. REV. 84 (1972) (recommending use of balancing test).

24. Although the 65% figure was not explicitly mentioned by Justice Department officials, a staff member of the reapportionment committee testified that he "got the feeling . . . that 65 percent would be probably an approved figure" after discussions over the phone and in person. 510 F.2d at 527. That also was the figure used by the NAACP to reflect "safe" black majority districts. The basis for this figure seems to be that a higher percentage of white residents than nonwhite residents are eligible to vote. 97 S. Ct. at 1009 n.22, 51 L. Ed. 2d at 245 n.22.

25. 97 S. Ct. at 1011, 51 L. Ed. 2d at 248. Preferential treatment on the basis of race, even of the previously disadvantaged, raises such questions as whether the purported preferential treatment disguises a policy that perpetuates disadvantageous treatment; whether it serves to stimulate society's latent race consciousness; whether it conforms minority stereotypes of dependency; whether it causes strong feelings of injustice in those on whom the burden is placed; and whether the burdens are distributed fairly among majority members. *Id.* at 1013-16, 51 L. Ed. 2d at 248-53 (Brennan, J., concurring).

26. Justices Stevens, Brennan, and Blackmun join in this portion of Justice White's opinion.

27. 510 F.2d at 522-25.

28. *See* notes 7-8 *supra*.

29. 97 S. Ct. at 1005, 51 L. Ed. 2d at 240-41.

30. *See* notes 16-18 *supra* and accompanying text.

31. *See* notes 14-15 *supra* and accompanying text.

reapportionment must not lead to a retrogression in the position of racial minorities regarding their effective exercise of the electoral franchise. Under the Voting Rights Act the Attorney General is required to condition his approval of reapportionment on satisfaction of the *Beer* test. To meet the test, consideration must be given to the number of black majority districts. In order to be a black majority district satisfying the Voting Rights Act, both *Beer* and *City of Richmond* require some figure higher than fifty percent. "But whatever the specific percentage, the State will inevitably arrive at it as a necessary means to ensure the opportunity for the election of a black representative and to obtain approval of its reapportionment plan."[32] Thus, the use of some specific numerical quotas is required and a redistricting does not violate the fourteenth or fifteenth amendments merely by using such quotas.

Given the emphasis in *Beer* on the "effective exercise of the electoral franchise,"[33] the four-member plurality concluded that the Attorney General's belief that a nonwhite population majority in the vicinity of sixty-five percent would be necessary to achieve a nonwhite majority of eligible voters was a reasonable one. Since the plaintiffs failed to show that the Attorney General required more than the fulfillment of the nonretrogression principle,[34] they did not establish that the final redistricting plan was unconstitutional.[35]

Part IV of Justice White's opinion relied heavily on *Gaffney v. Cummings*[36] to establish the lack of any invidious purpose. According to White, the 1974 plan could "be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters in Kings County."[37] Seen in this light the plan had neither an impermissible purpose[38] nor an impermissible effect.[39] Thus, White relied on a racial fairness principle which was analogous

32. 97 S. Ct. at 1008, 51 L. Ed. 2d at 244.

33. 425 U.S. at 141.

34. 97 S. Ct. at 1009, 51 L. Ed. 2d at 245. Since there was not an attempt at such a showing, and since *Beer* and *City of Richmond* were decided after the lower court decisions, the Chief Justice believed the case should be remanded. *Id.* at 1019, 51 L. Ed. 2d at 257. Although it might seem that a showing that either the legislature or the Attorney General exceeded the *Beer* requirements would be sufficient, that is not the case. The Voting Rights Act fixes venue in the District Court for the District of Columbia, and limits standing to complain of noncompliance with the Act by the Department of Justice to the state or political subdivision. 42 U.S.C. § 1973c (1970). Consequently, the Eastern District of New York was not the proper forum, and the plaintiffs lacked standing to complain of the Attorney General's actions.

35. 510 F.2d at 525. Although the circuit court relied on the Voting Rights Act to uphold New York's actions, Justices White, Stevens, and Rehnquist endorsed the broader view that the Constitution permits racial considerations as a tool to protect minority voting strength, irrespective of the congressional authority.

36. 412 U.S. 735 (1973); *see* notes 10-13 *supra* and accompanying text.

37. 97 S. Ct. at 1011, 51 L. Ed. 2d at 247. Professor Gunther of Stanford University has suggested that the Court is moving toward a theory of equal protection "with bite" which no longer finds acceptable the practice of postulating possible legitimate ends for the state but which demands evidence of actual state ends in legislative history. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

38. The plan "represented no racial slur or stigma with respect to whites or any other race." 97 S. Ct. at 1009, 51 L. Ed. 2d at 246.

39. "Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength." *Id.* at 1010, 51 L. Ed. 2d at 246.

to the political fairness principle held to be acceptable in *Gaffney*. The racial representation in districts was fair under the revised plan because it left a proportion of minority districts in Kings County that were less than or equal to the proportion of minority population.[40] In such a situation the interests of white residents of black majority districts, insofar as particular interests are racially linked, will continue to be represented by those legislators elected from districts with white majorities.[41]

Justice White viewed this situation as similar to one presented when a political unit changes from an at-large voting system to a districting system so as to increase minority representation by preventing minorities from being "repeatedly outvoted."[42] White would approve of the hypothetical situation and the 1974 redistricting changes on the basis of the same racial fairness principle. Both should be permitted provided the majority still has "fair" representation and no other constitutional provisions are violated.[43] Justice Brennan did not join in this portion of White's opinion, wishing to postpone "this thorny question until another day" and having serious doubts about the applicability of *Gaffney* as a political redistricting case to reapportionment by race.[44] In his concurring opinion he pointed out some of the policy problems with minority preferential treatment, but he indicated that the Voting Rights Act avoided or mitigated these problems[45]

Justice Stewart's separate concurring opinion, joined in by Justice Powell, emphasized the lack of any showing of purposeful discrimination.[46] Although discriminatory impact and awareness of race both provide some evidence of an invidious purpose,[47] here there was no discriminatory impact because of the overall proportions of minority and majority districts within the county. While there was awareness of race, "[s]uch awareness is not . . . the equivalent of discriminatory intent."[48] Here the inference to invidious purpose is prevented because the clear purpose of the legislature was to comply with the Voting Rights Act.[49]

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40. In Kings County the revised plan left white majorities in approximately 70% of the districts when the county population was 65% white.

41. 97 S. Ct. at 1010 n.24, 51 L. Ed. 2d at 246 n.24 (citing 25 STAN. L. REV. 87 (1972)); *see* note 23 *supra* and accompanying text.

42. 97 S. Ct. at 1011, 51 L. Ed. 2d at 247.

43. *Id.* White's opinion raises interesting questions about the application of a racial fairness principle to nonvoting contexts such as employment or college admissions. Is Part IV of his opinion, which is unnecessary as a basis for affirming the lower court, an attempt to line up support for such a principle in other areas? The similarity with the language of the dissent in *Bakke* (*see* note 21 *supra*) suggests it may be. On the other hand, Justice White's previous defenses of the right to vote as fundamental suggest he may be trying to preserve a racial fairness principle in the voting area even though he finds it inapplicable elsewhere. *See* American Party of Texas v. White, 415 U.S. 767 (1974); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

44. 97 S. Ct. at 1012-13, 51 L. Ed. 2d at 249.

45. *Id.* at 1011-16, 51 L. Ed. 2d at 248-54; *see* note 25 *supra*.

46. "Under the Fourteenth Amendment the question is whether the reapportionment represents purposeful discrimination against white voters." 97 S. Ct. at 1017, 51 L. Ed. 2d at 254 (citing Washington v. Davis, 426 U.S. 229 (1976)).

47. 97 S. Ct. at 1017, 51 L. Ed. 2d at 254-55 (citing *Arlington Heights* and *City of Richmond*).

48. 97 S. Ct. at 1017, 51 L. Ed. 2d at 255.

49. *Id.* Decisions making it more difficult to show invidious discrimination against minorities may also operate to make it easier for voluntary preferential treatment of minorities, such as that in *Bakke* and *United Jewish Organizations*, to pass court scrutiny. If preferential

Chief Justice Burger's dissent opposed any use of quotas or mechanical "racial gerrymandering"[50] by means of a two-stage argument. First, he argued against Part IV of White's opinion on the basis of *Gomillion v. Lightfoot*.[51] He argued that New York's actions would not be constitutionally permissible in the absence of the Voting Rights Act by reading *Gomillion* as holding that drawing political boundaries "with the sole, explicit objective of reaching a specific racial result cannot ordinarily be squared with the Constitution."[52] The Chief Justice's reading of *Gomillion* differs from the rest of the court. They would distinguish *Gomillion* on the basis of "fencing out from participation in the political process" or "motivated by racial animus."[53] The second stage of the Chief Justice's argument was directed at showing that New York's actions are not made constitutionally permissible by attempts to comply with the Voting Rights Act. He rejected the use made by Justice White of the *Beer* test, but even granted that it was the proper test, Burger believed the case should have been remanded for further factual determination since it was dismissed at the pleading stage before the *Beer* test was formulated.[54]

III. CONCLUSION

In *United Jewish Organizations* the Supreme Court goes beyond prior cases to uphold the use of explicit numerical racial goals to obtain Attorney General approval of redistricting. In the absence of a showing that the redistricting plan went further than required by the *Beer* nonretrogression test, no violation of rights of the white voters existed when their overall strength was still proportionally represented. The use of a racial fairness principle by three Justices in approving New York's use of explicit numerical goals, without relying on the Voting Rights Act, and emphasis on lack of invidious purpose by two more Justices, may herald the acceptability of other voluntary remedial devices to increase minority achievement.

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treatment can be put in three constitutional categories, "forbidden," "permitted," and "obligatory," one could describe the Court as expanding the middle category at the expense of the other two.

50. 97 S. Ct. at 1020, 51 L. Ed. 2d at 259.

51. 364 U.S. 339 (1960); *see* note 9 *supra*.

52. 97 S. Ct. at 1016, 51 L. Ed. 2d at 255.

53. *Compare id.* at 1017-18, 51 L. Ed. 2d at 255 (Burger, J., dissenting), *with id.* at 1010, 51 L. Ed. 2d at 246 (White, J., joined by Stevens and Rehnquist, JJ.), *and id.* at 1011, 51 L. Ed. 2d at 248 (Brennan, J., concurring), *and id.* at 1016, 51 L. Ed. 2d at 254 (Stewart, J., concurring, joined by Powell, J.).

54. *Id.* at 1018-19, 51 L. Ed. 2d at 257. Burger suggests that the same standards should be applied to minorities and majorities irrespective of the intent. In terms of the ideals analysis, the Chief Justice favors the ideal of equal treatment over the ideal of equal achievement.